Toffoloni v. LFP Publishing Group, LLC Doc. 5

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

**MAUREEN TOFFOLONI,** )
as Administrator and Personal )
Representative of the ESTATE )
OF NANCY E. BENOIT, )
) CASE NO. 1:08-cv-00421-TWT
Plaintiff, )
)
vs. )
)
**LFP PUBLISHING GROUP, LLC,** )
d/b/a Hustler Magazine, et al, )
)
Defendant. )

## DEFENDANT LFP PUBLISHING GROUP, LLC'S INITIAL DISCLOSURES

1.

**If the defendant is improperly identified, state defendant's correct identification and state whether defendant will accept service of an amended summons and complaint reflecting the information furnished in this disclosure response.**

Not Applicable.

2.

**Provide the names of any parties whom defendant contends are necessary parties to this action, but who have not been named by plaintiff. If defendant contends that there is a question of misjoinder of parties, provide the reasons for defendant's contention.**

Not Applicable.

Dockets.Justia.com

3.

**Provide a detailed factual basis for the defense or defenses and any counterclaims or crossclaims asserted by defendant in the responsive pleading.**

Plaintiff Maureen Toffoloni ("Toffoloni") is the mother of her decedent daughter, Nancy Benoit, who had been involved in the professional wrestling business for many years and had been a conceded public figure. Ms. Benoit was murdered in her Atlanta, Georgia home in 2007 by her husband, famous professional wrestler Chris Benoit, who strangled decedent, their son, and then committed suicide. The murder made national and international headlines, in part due to Chris Benoit's alleged use of steroids.

Some 20 years prior to her death, Nancy Benoit as a prospective model posed nude for photographs and a videotaping by one Mark Samansky. Samansky allegedly told Ms. Benoit that he had destroyed the photographs and videotape, but he kept the tape. When decedent's murder became a major news story, Samansky contacted Defendant LFP Publishing Group, LLC ("LFP"), the publisher of *Hustler* magazine, a national magazine published 13 times a year. Samansky then conveyed the publishing rights to photographs he apparently extracted from his videotape, and photographs of a young Nancy Benoit, some depicting her nude, were published in the March, 2008 issue of *Hustler.* The photographs were voluntarily posed, are lawful and non-obscene, and were part of a full two-page story on Nancy Benoit's life and death, including her career involving professional wrestling, and illustrate the fact that she had posed nude as a young woman.

LFP contends that publication of the voluntarily posed, non-obscene, nude photographs of decedent public figure Nancy Benoit as part of a newsworthy story on her life and death are outside of the Georgia posthumous common law right of publicity, and therefore do not violate same. Moreover, if such publication does violate Georgia law, it is protected by the right of freedom of the press enshrined in the First Amendment to the United States Constitution.

4.

**Describe in detail all statutes, codes, regulations, legal principles, standards and customs or usages, and illustrative case law which defendant contends are applicable to this action.**

Plaintiff Toffoloni's single substantive right of publicity claim is asserted pursuant to Georgia common law, set forth in Cabaniss v. Hipsley, 114 Ga. App. 367 (1966) and Martin Luther King, Jr. Center v. American Heritage Products, 250 Ga. 135 (1982). Plaintiff must prove, among other elements of her claim, that she has standing to bring a claim for right of publicity on behalf of decedent Benoit.

Defendant LFP contends that its publication of the nude photographs of decedent are exempt from liability under Georgia common law as newsworthy, under such cases as Waters v. Fleetwood, 212 Ga. 161 (1956). In the event Defendant's publication of the aforesaid photographs are found to violate the Georgia right of publicity, they are immune from liability pursuant to the First Amendment to the United States Constitution. Non-obscene adult entertainment is protected by the First Amendment, Reno v. American Civil Liberties Union, 521 U.S. 844, 117 S.Ct. 2329 (1997). The First Amendment rights of freedom of the press for publications are set forth in cases such as Regan v. Time, Inc., 468 U.S. 641, 104 S.Ct. 3262 (1984).

The crux of the Eleventh Circuit opinion reversing this Court's dismissal of this action was that because the nude photographs of decedent Benoit were taken more than 20 years prior to her murder, they were not part of a "newsworthy" article and are therefore not exempt from liability under the newsworthiness exception to the Georgia right of publicity. 572 F.3d 1201, 1213. Although strongly asserted as a defense in LFP's motion papers, the Court never even discussed the First Amendment implications of this action, or applicable Supreme Court cases. However, the Supreme Court has warned against attempts by courts to define the concept of "newsworthiness." Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997 (1974); Harper & Rowe Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 105 S.Ct. 2218 (1985), quoting Lerman v. Flynt Distributing Co., Inc., 743 F.2d 123 (2d Cir. 1984). Under Supreme Court precedent, it is for the editors of *Hustler* magazine to determine whether the subject photographs were newsworthy and lawful for publication, and not the courts.

Defendant further contends that, even if its publication of the photographs at issue were not exempt from liability as "newsworthy," the injuries sought to be redressed by Plaintiff are not the type or nature of injury recoverable under the right of publicity.

5.

**Provide the name and, if known, the address and telephone number of each individual likely to have discoverable information that you may use to support your claims or defenses, unless solely for impeachment, identifying the subjects of the information. (Attach witness list to Initial Disclosures as Attachment A.)**

See Attachment A, hereto.

6.

**Provide the name of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence. For all experts described in Fed.R.Civ.P. 26(a)(2)(B), provide a separate written report satisfying the provisions of that rule. (Attach expert witness list and written reports to Initial Disclosures as Attachment B.)**

See Attachment B, hereto.

7.

**Provide a copy of, or description by category and location of, all documents, data compilations, and tangible things in your possession, custody, or control that you may use to support your claims or defenses unless solely for impeachment, identifying the subjects of the information. (Attach document list and descriptions to Initial Disclosures as Attachment C.)**

See Attachment C, hereto.

8.

**In the space provided below, provide a computation of any category of damages claimed by you. In addition, include a copy of, or describe by category and location of, the documents or other evidentiary material, not privileged or protected from disclosure on which such computation is based, including materials bearing on the nature and extent of injuries suffered, making such documents or evidentiary material available for inspection and copying under Fed.R.Civ.P. 34. (Attach any copies and descriptions to Initial Disclosures as Attachment D.)**

Not Applicable.

9.

**If defendant contends that some other person or legal entity is, in whole or in part, liable to the plaintiff or defendant in this matter, state the full name, address, and telephone number of such person or entity and describe in detail the basis of such liability.**

Not Applicable.

10.

**Attach for inspection and copying as under Fed.R.Civ.P. 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in this action or to indemnify or reimburse for payments to satisfy the judgment. (Attach copy of insurance agreement to Initial Disclosures as Attachment E.)**

Not Applicable.

Respectfully submitted this 28th day of October, 2009.

*/s/ S. Derek Bauer*
James C. Rawls
Georgia Bar No. 596050
Barry J. Armstrong
Georgia Bar No. 022055
S. Derek Bauer
Georgia Bar No. 042537

McKENNA LONG & ALDRIDGE LLP
303 Peachtree Street, NE, Suite 5300
Atlanta, Georgia 30308
(404) 527-4000
(404) 527-4198 (facsimile)
*Pro hac vice*:

Paul J. Cambria
Jeffrey F. Reina
William F. Feigenbaum

LIPSITZ, GREEN, SCIME, CAMBRIA, LLP
42 Delaware Avenue, Suite 120
Buffalo, New York 14202

Attorneys for LFP Publishing Group, LLC, d/b/a Hustler Magazine, et al.

*Tomfooling v. LFP Publishing Group, LLC*
USDC, NDGA, Civil Action File No. 1:08-cv-00421-TWT

**ATTACHMENT A TO PLAINTIFF'S INITIAL DISCLOSURES**

**Potential Witnesses in Support of Defenses**

Known witnesses likely to have discoverable information that Defendant may use to support its defenses are as follows:

1. Maureen Toffoloni
   Address Unknown

   Subjects of Information: Plaintiff Maureen Toffoloni is likely to have information about the factual bases of her purported claims and alleged damages sustained in this action, including decedent's career as a woman wrestler, professional model and public figure; her posing for nude and non-nude photographs for Defendant Mark Samansky and possibly others; Plaintiff's exploitation of photographs of Decedent Benoit, nude or otherwise, subsequent to her death; all efforts by decedent Benoit during her lifetime to exploit photographs of her, nude or clothed; all revenues and profits realized by Plaintiff Toffoloni from exploitation of photographs of decedent Benoit since her death; and any alleged damages sustained by Plaintiff as the result of publication of the subject photographs of Benoit in the March, 2008 issue of *Hustler* magazine..

2. Tyler Downey
   Address unknown

Subjects of Information: Mr. Downey is a former editor of *Hustler* magazine who was involved in obtaining the rights to publish the subject photographs of decedent Nancy Benoit from Defendant Mark Samansky that were published in the March, 2008 issue of *Hustler* magazine. Mr. Downey will have knowledge of his negotiations with Defendant Samansky; the consideration paid by Defendant LFP to Mr. Samansky for the right to publish his photographs of decedent Benoit in *Hustler* magazine; the writing of the article on Ms. Benoit's life and death that was illustrated by the subject photographs of Ms. Benoit; and how the subject photographs were chosen for publication in *Hustler* magazine.

3. Mark Samansky
Address unknown

Subjects of Information: Mr. Samansky was the photographer and videographer who took photographs and a videotape of decedent Nancy Benoit depicting her nude that makes up the subject of this lawsuit. Mr. Samansky can give information as to the circumstances in which decedent Nancy Benoit posed for him for the photographs and videotape; how he obtained the subject photographs some 20 years or more after they were taken; his grant of publication rights in the subject photographs to *Hustler* magazine; and the consideration that he was paid by *Hustler* magazine for the publication rights thereof.

4. Bruce David
LFP Publishing Group, LLC
c/o Jeffrey F. Reina, Esq.
Lipsitz Green Scime Cambria LLP
42 Delaware Avenue, Suite 120
Buffalo, New York 14202-3924
(716) 849-1333, Ext. 481

Subjects of Information: Mr. David currently is and was at the time of publication of the subject photographs of decedent Nancy Benoit, the Editorial Director of *Hustler* magazine. Mr. David will have knowledge as to the decision to publish the subject article and photographs of decedent Nancy Benoit, and his belief that publication of said photographs was part of a bona fide news article on Benoit's life and death, that the photographs of her illustrated her life, and were therefore a lawful newsworthy publication.

5. Donna Hahner
LFP Publishing Group, LLC
c/o Jeffrey F. Reina, Esq.
Lipsitz Green Scime Cambria LLP
42 Delaware Avenue, Suite 120
Buffalo, New York 14202-3924
(716) 849-1333, Ext. 481

Subjects of Information: Ms. Hahner is, and was at the time of the publication of the subject photographs, Corporate Vice President of Defendant LFP Publishing Group, LLC. Ms. Hahner will have knowledge of the circulation and revenues obtained by Defendant LFP Publishing Group, LLC from publication of the subject March, 2008 issue of *Hustler* magazine containing the subject photographs of Nancy Benoit, as well as circulation and revenue figures for the February, March and April issues of *Hustler* magazine for relevant years.

*Toffoloni v. LFP Publishing Group, LLC*

USDC, NDGA, Civil Action File No. 1:08-cv-00421-TWT

**ATTACHMENT B TO PLAINTIFF'S INITIAL DISCLOSURES**

Expert witness list and expert reports, if any, to be added later.

Defendant LFP Publishing Group, LLC has not engaged any expert witnesses at this time.

*Toffoloni v. LFP Publishing Group, LLC*
USDC, NDGA, Civil Action File No. 1:08-cv-00421-TWT

## ATTACHMENT C TO PLAINTIFF'S INITIAL DISCLOSURES

### Documents and Tangible Things

Without waiving the right to assert any additional applicable privileges, the documents and tangible things not privileged or protected from disclosure, which Defendant LFP Publishing Group, LLC may use in support of its defenses, are as follows:

The subject article on the life and death of Nancy Benoit that appeared in the March, 2008 issue of *Hustler* magazine, along with its accompanying nude and other photographs of Nancy Benoit as a young woman obtained by Defendant LFP from Mark Samansky; any letters or other documents relating to the publication of said article; relevant circulation and revenue figures for *Hustler* magazine; and the consideration paid by Defendant LFP to Defendant Mark Samansky for the right to publish his photographs of decedent Nancy Benoit in *Hustler* magazine.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF GEORGIA**

| | | |
|---|---|---|
| **MAUREEN TOFFOLONI,**<br>as Administrator and Personal<br>Representative of the ESTATE<br>OF NANCY E. BENOIT,<br><br>Plaintiff,<br><br>vs.<br><br>**LFP PUBLISHING GROUP, LLC,**<br>d/b/a Hustler Magazine, et al,<br><br>Defendant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | CASE NO. 1:08-cv-00421-TWT |

## CERTIFICATE OF SERVICE

This is to certify that I have this day filed the within and foregoing DEFENDANT LFP PUBLISHING GROUP, LLC'S INITIAL DISCLOSURES via the CM/ECF system which will automatically send notification to Defendant's attorneys of record, who are participants in the CM/ECF system.

This 28th day of October, 2009.

/s/ S. Derek Bauer
S. Derek Bauer
Georgia Bar No. 042537

MCKENNA LONG & ALDRIDGE LLP
303 Peachtree Street, Suite 5300
Atlanta, Georgia 30308
(404) 527-4000
(404) 527-4198 (facsimile)

ATLANTA:5178532.1